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Intergovernmental Group of Experts on
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Eleventh session
Geneva, 23 November 1992
Agenda item 8

DRAFT REPORT OF THE INTERGOVERNMENTAL GROUP OF EXPERTS ON RESTRICTIVE BUSINESS PRACTICES ON ITS ELEVENTH SESSION

Held at the Palais des Nations, Geneva,
from 23 to 27 November 1992

Rapporteur: Mr. Donald Partridge (Canada)

CONTENTS

Chapter		Paragraphs
	Introduction	1 - 10
I.	Review of the operation of and experience arising from the application and implementation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (agenda item 3)	
	Activities relating to specific provisions of the Set (agenda item 4)	
	Work programme on restrictive business practices (agenda item 5)	11 - 21

GE.92-53001/1285K (E)

INTRODUCTION

1. The Intergovernmental Group of Experts on Restrictive Business Practices held its eleventh session at the Palais des Nations, Geneva, from 23 to .. November 1992.

2. In the course of the session, the Group held ... plenary meetings and ... informal meetings.

Opening statements

3. Upon his election as President, Mr. Gonzalo Santos (Philippines) commended the wide participation by experts from capitals. He noted that as the only universal forum for dealing with national and international competition policies, the UNCTAD Intergovernmental Group of Experts on Restrictive Business Practices attracted representatives from capitals in all regions. Over the last few years more and more developing countries in the process of industrialization had been elaborating their regulatory competition framework, taking into account the work done in UNCTAD. The high-level attendance at the present session reflected the market interest of formerly centrally planned and now privatizing economies in the current multilateral talks on experience in enforcing competition policy.

4. The Deputy to the Secretary-General of UNCTAD recalled that the Cartagena Commitment adopted at the eighth session of the Conference had emphasized the importance of strengthening national and international policies and multilateral cooperation to adapt to the profound political and economic changes that were taking place in the world. In order to strengthen UNCTAD's capabilities in addressing the economic and development problems of States members, the Conference had decided to reform the machinery and working methods of UNCTAD. In maintaining the Intergovernmental Group of Experts on Restrictive Business Practices as an integral part of the new institutional set-up, the international community at UNCTAD VIII had implicitly recognized the value of this body and its capacity to contribute to the overall efforts of UNCTAD in addressing the economic and development issues of the 1990s. In the area of competition, it had been established, in the Cartagena Commitment (para. 147), that "UNCTAD should pursue, through the Intergovernmental Group of Experts on Restrictive Business Practices, its work with regard to policies and rules for the control of restrictive business practices in order to encourage competition, to promote the proper functioning of markets and

efficient resource allocation, and to bring about further liberalization of international trade", and that efforts should be made by Governments or regional authorities to implement fully the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, and to develop cooperation between national competition authorities, including competent authorities of regional groupings. The Conference had further agreed in the Cartagena Commitment (para. 148) that "The UNCTAD secretariat and developed countries should also provide, upon request and within available resources, developing countries and other countries with technical cooperation in the area of competition policy". Those decisions had given added significance to the results of the Second United Nations Conference to Review All Aspects of the Set, which had been held in 1990, and reflected the progressive convergence of views over the use of market signals and the fostering of entrepreneurial initiatives to improve efficiency and competitiveness, while recognizing that governmental actions might be necessary to complement the operation of markets or to correct market deficiencies.

5. The present session had important tasks on its agenda. First, it was called upon to review the operation of, and experience arising from, the Set of Principles and Rules, including in particular steps taken by States, at the national or regional levels, to meet their commitment to the Set. Secondly, the Group had before it two major studies on RBPs: (a) the revised version of the secretariat study on "Concentration of market power through mergers, take-overs, joint ventures and other acquisitions of control, and its effects on international markets, in particular, the markets of developing countries" (TD/B/RBP/80/Rev.1), which the secretariat had been requested to finalize, taking into account the comments made by member States on the first version, and (b) the annotated outline of a possible study on "Competition policy issues related to industrialization in developing countries", which was contained in Part I of document TD/B/RBP/90.

6. Thirdly, the Group of Experts might wish to devote attention to the important issue of exchange of information and consultations in the area of restrictive business practices. In order to encourage bilateral or multilateral consultations, a document containing a revised indicative checklist for requests for information, as well as an indication of possible

steps which countries might wish to take in the preparation of a case, and in their request for consultations, had been prepared by the secretariat for consideration by the Group (TD/B/RBP/78). The document included an updated Directory of Restrictive Business Practices Control Authorities, which was intended to encourage exchanges between competition authorities, and would be continuously brought up to date by the secretariat.

7. In that connection, he said that, in accordance with the practice followed at each session of the Group, multilateral consultations were scheduled to take place at the present session on two topics: (a) Deregulatory issues, including the appropriate regulation of natural monopolies; and (b) The rights of defendants in competition investigations and proceedings.

8. Fourthly, the Group had before it proposals for a new draft of the model law on RBPs, in the light of the comments of member States during and after the tenth session (TD/B/RBP/81/Rev.1), as well as a further compilation of the Handbook on Restrictive Business Practices Legislation (TD/B/RBP/87 and Add.1).

9. Fifthly, a progress report on UNCTAD's technical assistance activities in the field of competition policy was also before the Group in Part II of document TD/B/RBP/90.

10. Last but not least, the Group was expected to give guidance to the UNCTAD secretariat concerning the work programme on restrictive business practices. Emphasis was placed on the implementation of the Set, in particular in encouraging all countries to adopt competition legislation. For that purpose, a practical modern model law should be finalized as soon as possible; the technical assistance, advisory and training services of UNCTAD should be strengthened; and cooperation with other organizations, such as OECD, increased. He expressed appreciation for the excellent support UNCTAD had been receiving from many OECD countries in the area of technical cooperation; such support was essential in view of the immense task that lay ahead. He added that the increasing convergence of views on the need to adopt national competition policies should lead to the harmonization of such views with respect to the place of competition rules in the evolving multilateral trading system. This goal was necessary to give full expression to the recommendation of the Cartagena Commitment he had cited, in particular the need "to encourage competition, to promote the proper functioning of markets and efficient

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resource allocation, and to bring about further liberalization of international trade". That recommendation had also called for UNCTAD's work on RBPs to cover both goods and services. With respect to services, the newly created Standing Committee on Developing Services Sectors: Fostering Competitive Services Sectors in Developing Countries, was requested in its terms of reference to take into account the work undertaken by the Intergovernmental Group of Experts on Restrictive Business Practices. Similarly, the newly created Ad Hoc Group on Comparative Experiences with Privatization, which would be meeting the following week, was requested in its terms of reference to coordinate with the work of other bodies of UNCTAD.

Chapter I

REVIEW OF THE OPERATION OF AND EXPERIENCE ARISING FROM THE APPLICATION AND IMPLEMENTATION OF THE SET OF MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES

(Agenda item 3)

ACTIVITIES RELATING TO SPECIFIC PROVISIONS OF THE SET:

(a) STUDIES ON RESTRICTIVE BUSINESS PRACTICES RELATED TO THE PROVISIONS OF THE SET OF PRINCIPLES AND RULES;

(b) INFORMATION AND CONSULTATIONS ON RESTRICTIVE BUSINESS PRACTICES;

(c) THE MODEL LAW OR LAWS FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES AND THE HANDBOOK ON RESTRICTIVE BUSINESS PRACTICES LEGISLATION;

(d) TECHNICAL ASSISTANCE, ADVISORY AND TRAINING PROGRAMMES ON RESTRICTIVE BUSINESS PRACTICES

(Agenda item 4)

WORK PROGRAMME ON RESTRICTIVE BUSINESS PRACTICES

(Agenda item 5)

11. The representative of China recalled that, although efforts had been made by the international community, the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, which had been adopted more than a decade ago in 1980, was not being adequately implemented. He emphasized that States, in particular developing countries, had an obligation to implement the Set. Since his country had decided to set up a Socialist market economy, there was a need for legislation to control restrictive business practices. Hence, a law was being drafted establishing general principles and containing substantive chapters covering, inter alia, control of abuses of dominant positions of market power.

12. The draft law would be submitted to the National People's Congress for consideration in 1993. Source materials used in the drafting process included UNCTAD documents such as the Handbook on Restrictive Business Practices Legislation, the Model Law on Restrictive Business Practices. Assistance had been sought from UNCTAD and from various countries and in that connection he thanked the UNCTAD secretariat for organizing a seminar in China in 1992 in

which experts from the United Kingdom, Norway and France had participated. Such assistance would go a long way towards making significant progress in the implementation of the Set of Principles and Rules in future and technical assistance of that kind would continue to be necessary.

13. The representative of Argentina, noting that the Intergovernmental Group of Experts was aware of his country's basic monopolies and competition law, said he would limit his statement to recent developments related to competition in the area of consumer protection and privatization. With respect to consumer protection, the Senate had recently approved a draft law for the defence of consumers, the text of which had been transmitted to the UNCTAD secretariat. On privatization, he gave details of recent accomplishments in his country with respect to telecommunications, the supply of electric energy and railways, three sectors where Argentina had successfully introduced competition in the process of privatization.

14. On UNCTAD's activities in the area of RBPs, he made the following proposals:

(i) That the practical use of the Model Law could be improved by increased focusing of the information it contained on recent trends and developments at the international level;

(ii) Noting that, in his delegation's view, the study on concentration of market power was satisfactory in its present form, he proposed that a new study should be prepared by the secretariat on the issues of deregulation, privatization and competition.

15. Such a study should be undertaken in cooperation with the Ad Hoc Working Group on Comparative Experiences with Privatization. With respect to technical assistance, he thanked UNCTAD and the German Government for organizing an RBP seminar in Argentina on 16-18 November 1992.

16. The representative of India referred to document TD/B/RBP/90, which drew attention to the strong trend in developing countries towards liberalization, deregulation and market orientation. It highlighted the main potential advantages of liberalization, i.e. the speedier and greater satisfaction of consumer needs, the stimulation of entrepreneurial activity, more efficiency in investment and at the enterprise level, and greater allocative efficiency by the market, which would be realized only if enterprises were spurred on by the need to compete, and received accurate information on the state of demand.

17. Many countries had either enacted a competition law for the first time or improved their legislation in that respect. In India, in 1991, comprehensive amendments had been made to the Indian competition law, the Monopolies and Restrictive Trade Practices (MRTP) Act of 1969. The changes were designed to give more power to the MRTP Commission. She added that India had greatly liberalized its import policy and foreign investment policy. Noting that countries were more prepared to promote liberalization when international markets were competitive, she wished to make the following suggestions for consideration by the Intergovernmental Group:

(i) There should be a harmonization of trade liberalization and competition policy;

(ii) Greater emphasis should be placed on promotion of, and encouragement for, competitive behaviour;

(iii) The Set of Principles and Rules should be made more comprehensive and should provide for relief in international transactions;

(iv) The Set should have some legal force.

18. The representative of Romania considered that the application and implementation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices was only possible in a market economy. Prior to December 1989, his country's economy had developed within the framework of a centrally planned system; after that date, it had embarked on a wide process with, as its basic economic objective, the transition to a market economy. In implementing that reform programme, a significant number of legislative measures had been adopted and enforced during 1990-1992, focused mainly on:

- Transformation and restructuring of State enterprises into autonomous commercial companies operating on market economy principles;
- The creation of suitable conditions for development and strengthening of the private sector;
- The encouragement of foreign investments by bringing in a liberal legislative framework which allowed the granting of important facilities and guarantees for foreign investors;
- Gradual price liberalization and the establishment of prices on a realistic basis, taking into account international costs and the elimination, to a large extent, of financial subsidies, along with the assurance of measures for social protection;

- The liberalization of foreign trade;
- The adjustment of the financial and banking system to meet market economy demands.

19. Although his country did not yet have a specific law on restrictive business practices, some laws adopted to introduce the economic and financial reform had been inspired by the main principles and rules contained in section D, articles 3 and 4, of the Set of Principles and Rules. For example: Law No. 15/1990 on the reorganization of State enterprises as "régies autonomes" and commercial companies which, under Chapter V ("Association and free competition"), prohibited practices restricting competition such as agreements, decisions and concerted practices, and abuses of dominant position. Other provisions against unfair competition behaviour were included in Law No. 11/1991. His country had also made progress in drafting a specific law on protection of competition, which had been formulated with the assistance of OECD experts and experts from competition authorities in such countries as the United States, France, Belgium and Germany.

20. He thanked the Competition Authorities of the United States (Federal Trade Commission and United States Department of Justice in June 1992), France (Council of Competition and Ministry of Economy and Finance in May 1992) and the OECD in September 1991, for the seminars organized in Romania.

21. In conclusion, he stated that it was not enough to have a law, even a good one, without proper enforcement and application of its provisions. To that end, his country was keenly interested in receiving specialized assistance to have its staff trained on concrete matters related to implementation of the law, i.e., ways and means for detecting RBPs and the conduct of investigations and inquiries.

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Addendum

CONTENTS

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	Activities relating to specific provisions of the Set (agenda item 4)	
	Work programme on restrictive business practices (agenda item 5)	22 - 46

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Chapter I (continued)

REVIEW OF THE OPERATION OF AND EXPERIENCE ARISING FROM THE APPLICATION AND IMPLEMENTATION OF THE SET OF MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES

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(Agenda item 4)

WORK PROGRAMME ON RESTRICTIVE PRACTICES

(Agenda item 5)

22. The representative of Italy described some features of the Italian competition law adopted in October 1990, which followed the same general approach as the model law. The law applied equally to private and public sector enterprises. The competition authority was responsible to Parliament so as to ensure its independence. It had the competence to recommend changes in legislation to make it conform more closely to competition principles, thus ensuring that the authority dealt not only with antitrust but also with competition policy. In the exercise of its power, the authority had intervened in highly regulated sectors such as telecommunications, public procurement and retail trade. Its experiences with respect to enforcement against RBPs were similar to those of other competition authorities. Intervention had been particularly necessary in the cement, dairy products and waste disposal industries.

23. The representative of Sri Lanka said that the Fair Trading Commission, which had come into operation in 1987, could investigate monopoly situations and anticompetitive practices, but mergers only after their creation. According to a proposal accepted by the Sri Lankan Cabinet, the Fair Trading Commission Act No. 1 of 1987 was to be amended to allow for investigations of proposed mergers. In recent weeks his country had lifted price controls on bread and wheat flour, leaving pharmaceuticals as the sole item under such control. With the repeal of sections 18 to 26 of the Fair Trading Commission Act and the removal of price surveillance, his Government envisaged a full-fledged market economy where firms could compete freely.

24. He noted that the revised draft of the UNCTAD study on Concentration of Market Power (TD/B/RBP/80/Rev.1), had taken into account the comments made at the tenth session of the IGE and requested the secretariat to finalize the study. In connection with the outline of a possible new study on "Competition policy issues related to industrialization in developing countries" prepared by the secretariat, he stated that the salient features of the new industralization policy in Sri Lanka were to encourage private sector industrialists to play a key catalysing and generative role in the rapid development of industry countrywide, to encourage export-oriented industries, and to introduce a new programme of industrial reform coupled with a rationalized tariff structure. An Industrialization Commission had been set up in January 1991 to coordinate industrial programmes and policies.

25. His Government had given every encouragement for foreign investment, and many international companies, from both the developed and developing countries, had invested in various industries in Sri Lanka. The three Free Trade Zones established for better coordination had been brought under one roof and redesignated a "Free Economic Zone". This had been further expanded by extending the incentives to cover export industries in any part of the island. He added that as many as 60 public sector corporations and boards had been privatized or given wholly or partly to the employees during the preceding three years; these ranged from textile mills to companies producing chinaware, distilleries, fertilizer plants, shipping lines and cement plants, among others. The new owners in the private sector were both international and local and included companies from Japan, Norway, Switzerland, the Republic of Korea, India and a number of other countries.

26. The representative of the United Kingdom of Great Britain and Northern Ireland stated that the Government had recently confirmed its commitment to replace the Restrictive Trade Practices Act (the Act) 1976, which dealt with agreements, by new legislation. The existing Act was restricted to agreements dealing with goods and was based on the structure of the agreement. An agreement which fell within the provisions of the Act it had to be registered with the Director-General of Fair Trading who was under a duty to refer it to the Restrictive Practices Court which would strike down agreements if they were against the public interest. The Government had concluded that the present system in the Act was inflexible and slow; it was too often concerned with harmless agreements and failed to direct itself adequately against anticompetitive agreements. New legislation was to be introduced when Parliamentary time could be found, based on provisions similar to those found in Article 85 of the Treaty of Rome. An agreement would be covered by the new Act if its object or effect was to restrict competition in the United Kingdom.

27. The United Kingdom attached great importance to competition and the need for Member States to have and to enforce competition laws. The work carried out by the UNCTAD secretariat on the Model Law would be helpful. Those countries that had competition laws and had experience in their application could assist those wishing to introduce such laws. The help that could be given was set out in the agreed resolution of the Second Review Conference in 1990. Since the tenth session of the Intergovernmental Group, the United Kingdom had given considerable involved technical assistance to other countries. Staff from the Office of Fair Trading had made a total of six overseas visits to provide technical assistance (twice to the Russian Federation, twice to Czechoslovakia, once to Lithuania and once to China) with the aim of assisting these countries to set up and develop their competition laws. Further, the United Kingdom had a total of 37 visits from 23 different countries from all parts of the globe; as well as several attachments to the Office. These visitors had come from Kenya, China, Jamaica and Russia.

28. The secretariat had developed a checklist for consultations, which should be useful, but it must be a flexible guide. Countries should not feel inhibited from approaching competition authorities who might be able to help them, by the formidable detail of the checklist.

29. The annual IGE session provided an excellent forum for an exchange of experiences among competition experts. In that respect the United Kingdom welcomed the movement since UNCTAD VIII towards a more flexible pattern of work in UNCTAD meetings. The secretariat was to be congratulated on the admirable quality of the papers produced for the session.

30. The representative of Canada stated that the competition policy in Canada had a long history of more than a hundred years. The modernization of competition law had been a long and intensely debated public policy issue. The process had begun in 1965 with a reference to the Economic Council of Canada and the first stage had been completed only in 1976 with the extension of the Act to the service sector. This process had culminated in 1986 with the passage of the Competition Act and the Competition Tribunal Act. The changes made included new investigation procedures to bring them into compliance with the 1982 Charter of Rights and Freedoms, a new civil merger review process and a modern provision on the abuse of dominant positions.

31. One of the major challenges for antitrust enforcement in recent years had been to withstand the numerous challenges under the Canadian Charter of Rights and Freedoms to various aspects of the law, both substantive and procedural. While a number of trial decisions had hindered progress in several important cases, the courts had signalled their endorsement of the policy underlying several key provisions of the Competition Act, considerably reducing the uncertainty regarding the enforceability of such positions.

- The constitutionality of the price-fixing provisions of the Act had been unequivocally upheld by a unanimous judgement of the Supreme Court of Canada.
- In July of 1992, the Supreme Court had upheld the power of the Competition Tribunal to enforce its decisions through contempt orders. The case in question concerned contempt proceedings before the Tribunal against Chrysler Canada for not following the terms of its order to resupply an auto parts exporter.
- The Supreme Court had upheld the constitutionality of the misleading advertising provisions of the Act.
- The Supreme Court had denied leave to appeal from a unanimous appellate court decisions affirming the constitutionality of the merger provisions of the Act as well as that of the Competition Tribunal.

- The Competition Tribunal had recently issued decisions in the first two fully-contested merger cases under the 1986 Competition Act as well as its second abuse of dominance decision.
- In the Laidlaw case, proceedings had been initiated before the Competition Tribunal under the abuse of dominance provisions of the Competition Act. The application had sought relief with respect to conduct, in particular, the use of restrictive covenants in contracts, "sham" litigation and acquisition of small competitors, which were designed to create and protect a dominant market position in waste removal services.

32. Enforcement guidelines, in particular, had become an important tool in the Bureau of Competition's efforts to articulate and clarify its enforcement policies and practices. In the past year, it had published guidelines on Price Discrimination and Predatory Pricing to add to the earlier guidelines concerning Mergers and Misleading Advertising.

33. The representative of Egypt underlined the importance of the current session of the Intergovernmental Group, as the first session after UNCTAD VIII. The Conference had strengthened the IGE mandate with regard to policies and rules for the control of RBPs in order to encourage competition, to promote the proper functioning of markets and efficient resource allocation, and to bring about further liberalization of international trade. The latter was important in view of the expected results of the Uruguay Round of trade negotiations, which were about to establish a new world trade order. Egypt was clearly committed to the Set of Principles and Rules adopted in 1980, as could be seen from the transformation under way, in his country, with a view to establishing a market economy. Reforms undertaken in that respect included the elimination of government restraints on trade and, in particular, import liberalization. Increased importance was attached to the private sector of the economy. While no comprehensive legislation to control RBPs was in existence, Egypt had taken measures to allow competition to play its role in full in the economy, and that would undoubtedly have favourable results. He noted, however, that while developing countries liberalized their economies in the interests of competition, developed countries and, in particular their transnational corporations, did not fully comply with agreed principles and rules. He felt that the Set should be made mandatory and applied to all States.

34. With respect to the Model Law, he emphasized the importance of its economic development objective. He hoped that the text would be agreed upon and that a final version would be made available as soon as possible.

35. He also drew attention to the need for technical assistance in the area of RBPs, as called for in the Set. He further emphasized the need for the IGE to give more extensive consideration to RBPs in services sectors of interest to developing countries, and to cooperate in that area with the Standing Committee concerned with services.

36. The representative of Czechoslovakia stated that the economy of his country was in transition from central planning to a market economy, and the transitional phase was characterized by low levels of competition. He noted that, in the privatization of many State-owned businesses which was taking place in his country, special attention was devoted to exposing the privatized firms to market forces. Hence, great opportunities to strengthen competition were created in the process. He said that the Competition Protection Act No. 63, which had come into force on 1 March 1991, provided the legal framework for protection against illicit restraints to competition. The commitments resulting from the Set of Principles and Rules were covered in the Act. Authority to control competition was vested with the Ministry for Economic Competition in the Czech Republic and with the Slovak Antimonopoly Office in the Slovak Republic. He added that the activities of the antimonopoly offices focused on the following areas: (i) cartel agreements, mergers, abuse of dominant position of entrepreneurs in the market; (ii) opinions on analyses of privatization projects of companies with a monopolistic or dominant position; (iii) realization of other provisions for stimulating economic competition, for example in the field of public procurement and the regulation of natural monopolies. The antimonopoly offices attached particular importance to international cooperation and the sharing of experiences with the competition authorities of other countries and organizations with which contacts had been established.

37. The representative of the Commission of the European Communities stated that the Commission fully endorsed the main objectives of the Set of Principles and Rules, namely to ensure that RBPs did not impede or negate the realization of the benefits that should arise from the liberalization of

tariff and non-tariff barriers. The Commission conformed to that objective of the Set with respect to both its internal and its external trade. The Community's competition rules were comprehensive and covered a broad range of issues. In addition to active application of the rules to both private and public enterprises, the Commission had recently increased its efforts to enforce the competition rules in so far "forgotten" sectors such as public utilities, in order to ensure that real competition existed in all sectors, including telecommunications, energy, water and transportation. The community also included State aids in its control of competition.

38. The Community had been trying to negotiate comparably comprehensive competition rules in its bilateral trade agreements with a number of other nations, including the developing countries. There were important competition components in the agreements with Poland, Hungary and Czechoslovakia. This was also true of the European Economic Area Agreement, which was expected to enter into force on 1 January 1993, and of agreements with developing countries of Latin America, Africa and Asia. The European Community fully recognized the importance of competition policy as a tool to liberalize trade and was willing to provide technical assistance to developing and other countries in that area.

39. The representative of the Republic of Korea said that his country had enacted the Monopoly Regulation and Fair Trade Act in April 1981, one year after the adoption of the Set of Principles and Rules, and had established its Fair Trade Commission under that Act. In the initial stage of the Act's implementation, the Commission had mainly regulated unfair business practices, such as unreasonable refusals to deal, discrimination of prices and of other terms of transactions, and abuse of dominant position. Since the mid-1980s, the Commission had focused its efforts on strengthening measures against concentration of market power, and unfair business practices. In order to achieve those objectives more effectively, the Act had been amended three times: in 1986, 1989 and 1992.

40. He said that the Fair Trade Commission had served to stimulate free and fair competition in his country, and this had led to the enhancement of consumer welfare and the competitiveness of domestic firms. These positive results were reinforced by active deregulation measures in various areas,

including liberalization of foreign trade and investment, which brought additional competition into the country. Furthermore, the Commission was strictly enforcing several measures under the Act to restrict the concentration of economic power. In fact, in November 1992, his country had just revised the Fair Trade Act to strengthen restrictions on cross-ownership and capital investment limits for large business groupings. He stated that the Commission had also been active in controlling the collusive activities of firms and RBPs by trade associations. Moreover, it had strengthened its cooperation with foreign competition authorities and relevant organizations. For example, in September 1991, Korea had hosted the International Conference on Competition Policy and Economic Growth cosponsored by the Korean Development Institute (KDI) and UNCTAD.

41. In conclusion, he drew attention to anticompetitive practices, such as voluntary export restraints and orderly market agreements, which led to export cartels. Those restraints needed to be properly addressed by UNCTAD.

42. The representative of the Philippines stated that her country had undertaken a comprehensive economic restructuring programme characterized by an aggressive market orientation strategy. In the 1990s, the Government had launched an autonomous liberalization programme reducing tariff and non-tariff barriers to trade. Market-friendly policies had also been adopted in other areas of the economy. In June 1991, the Government enacted into law the Foreign Investment Act which would allow automatic entry of 100 foreign equity investments except in a limited number of areas. A significant step towards deregulation had also been taken in the current year with the liberalization of the foreign exchange regime. Her country had also embarked on an aggressive privatization programme with the setting up of the Committee on Privatization. Legislation was also pending on the restructuring of the banking system.

43. She indicated that a review of the competition laws and policies in the Philippines could be found in UNCTAD documents TD/B/RBP/89 and ITP/63. National policy against unfair competition was enshrined in the Constitution itself and found expression in some legislative and administrative acts administered by several government agencies, such as the Department of Trade and Industry, the Securities and Exchange Commission, the Central Bank, etc.

Efforts were being made to strengthen and rationalize competition laws in pending legislation and bills aimed at: (1) adoption of a comprehensive and integrated competition law; (2) institution building through the establishment of an antitrust Commission; and (3) strengthening of an enforcement mechanism through the creation of an office for the antitrust prosecutor. She added that national efforts in that area had been given generous technical support by international institutions such as UNCTAD. On 20-21 November 1991, a regional workshop on RBPs had been held in Manila for ASEAN countries with the participation of experts from Norway and the Netherlands.

44. She observed that the discussions in the IGE had been devoted almost exclusively to an inward-looking examination of national RBP policies. However, domestic competition laws were designed, through limitations on jurisdiction, to promote national economic interests only and did not reconcile the conflicting interests of different countries. It would, perhaps, be opportune at the present time to explore the possibilities of advancing international cooperation relating to unfair competition practices. First, the Set should be strengthened by giving it a legally binding character. Initiatives had been made in other forums and the same could be done in the IGE. In the Uruguay Round negotiations, provisions on business practices had been included in the draft agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and the General Agreement on Trade in Services (GATS). The provisions called also for national legislation in addressing RBPs and, at the international level, for the sharing of information and the mechanisms for consultation. Secondly, there was scope for addressing anticompetitive behaviour within the overall multilateral framework. It was often repeated that activities of private firms outside their home countries were exclusively a matter for the competition laws of the host countries concerned. However, domestic competition laws alone provided an imperfect means of protecting the vitality of present-day competition. A study conducted in 1991 under the auspices of the World Bank entitled The Basics of Anti-Trust Policy showed that international and domestic competition policies were mutually reinforcing. An example was given of the United States and EC antitrust policies which applied to economic exchanges

not only within the State or member country concerned but also to activities outside the State or national border. The IGE could learn from the United States and the EC in developing cooperation for the control of RBPs across national frontiers.

45. The representative of France drew attention to the multilateral consultations scheduled to take place at the present session at which his delegation had volunteered to make a presentation on the topic of "The rights of defendants in competition investigations and proceedings". In this connection, his Government had submitted a background text, which was available in document TD/B/RBP/91. He said that the IGE was an excellent forum for contacts between competition authorities of all countries of the world.

46. As to what concerned the enforcement of the competition law, he stressed the three main points characterizing the action of the French authorities. These were (i) regulation of competition to promote market equilibrium, (ii) respect for the principle of transparency in the relationships between economic partners, and (iii) daily action to promote loyalty in commercial transactions.

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DRAFT REPORT OF THE INTERGOVERNMENTAL GROUP OF EXPERTS ON RESTRICTIVE BUSINESS PRACTICES ON ITS ELEVENTH SESSION

Held at the Palais des Nations, Geneva,
from 23 to 27 November 1992

Rapporteur: Mr. Donald Partridge (Canada)

Addendum

CONTENTS

Chapter		Paragraphs
I.	Review of the operation of and experience arising from the application and implementation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (agenda item 3)	
	Activities relating to specific provisions of the Set (agenda item 4)	
	Work programme on restrictive business practices (agenda item 5)	47 - 55
II.	Organizational matters	56 - 60

GE.92-53025/0709A (E)

Chapter I (continued)

REVIEW OF THE OPERATION OF AND EXPERIENCE ARISING FROM THE APPLICATION AND IMPLEMENTATION OF THE SET OF MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES

(Agenda item 3)

ACTIVITIES RELATING TO SPECIFIC PROVISIONS OF THE SET:

(a) STUDIES ON RESTRICTIVE BUSINESS PRACTICES RELATED TO THE PROVISIONS OF THE SET OF PRINCIPLES AND RULES;

(b) INFORMATION AND CONSULTATIONS ON RESTRICTIVE BUSINESS PRACTICES;

(c) THE MODEL LAW OR LAWS FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES AND THE HANDBOOK ON RESTRICTIVE BUSINESS PRACTICES LEGISLATION;

(d) TECHNICAL ASSISTANCE, ADVISORY AND TRAINING PROGRAMMES ON RESTRICTIVE BUSINESS PRACTICES

(Agenda item 4)

WORK PROGRAMME ON RESTRICTIVE BUSINESS PRACTICES

(Agenda item 5)

47. The representative of Poland described the provisions and implementation of the Polish Antimonopoly Act of 1990 (amended in 1991), and the administration of its Antimonopoly Office. In conformity with the Constitution, the Act was aimed at the elimination of barriers to competition and the creation of a new business culture, in the context of policies of stabilization, demonopolization and privatization. Implementation had been difficult because of the legacy from a centrally-planned economy. She emphasized that a thorough rule of reason was applied in economic analysis. Over 280 decisions had been made by the Office against RBPs, mainly relating to dominant positions, cartels and market allocation. Special problems had been experienced with natural monopolies. The Office had been reluctant to control prices, finding that exposure to competition from imports was more effective. However, a balanced approach to imports was applied to avoid bankrupting firms.

48. Out of 1,200 notifications to the Office concerning transformation and establishment of new firms, 60 conditional approvals and 60 adverse decisions had been made. A 100 firms had been removed from the Government's list for mass privatization in order to avoid the creation of private monopolies, and priority had been given to restructuring to strengthen competition and efficiency. The main emphasis of the Office was on the creation of competitive markets so as to deal with the causes rather than the effects of RBPs. The microeconomic studies of the Office provided inputs in the formulation of macroeconomic policy, and the Office exercised an advocacy function for competition in formulating new legislation.

49. However, the Office had encountered some opposition because it was felt that large firms were more competitive and because of protectionist regimes in foreign markets, particularly for agricultural products. The Office had also had experiences with RBPs by foreign investors, which gave a bad example and involved difficult trade-offs. The Office greatly appreciated the contacts with or cooperation received from Germany, the United States, the EEC, the OECD, Czechoslovakia and Hungary. The representative of Poland expressed satisfaction with the multilateral cooperation within the Intergovernmental Group of Experts, and requested that UNCTAD organize projects or studies on the specific competition issues facing countries in transition towards a market economy as well as on competition issues relating to foreign investment in developing countries and countries in transition.

50. The representative of the United States of America stated that he hoped all delegations would participate in the multilateral consultations held during the present session and make contributions to them. He further hoped that the IGE would be an attractive forum for exchanges of views on substantive competition issues in a spirit of openness.

51. The representative of Germany stated that difficulty in establishing and securing a framework for business activity and competition was common not only to eastern European countries and developing countries, but at present also to a developed country such as his own. The challenge stemmed from his country's move towards economic unity following the change over in the former German Democratic Republic to a market economy, which called for measures to orient

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REVIEW OF THE OPERATION OF AND EXPERIENCE ARISING FROM THE APPLICATION AND IMPLEMENTATION OF THE SET OF MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES

ACTIVITIES RELATING TO SPECIFIC PROVISIONS OF THE SET

WORK PROGRAMME ON RESTRICTIVE BUSINESS PRACTICES

Draft agreed conclusions submitted by the Chairman

The eleventh session of the Intergovernmental Group of Experts on Restrictive Business Practices, having met from 23 to 27 November 1992, agrees to the following conclusions:

A. Item 4(a) - Studies

The secretariat should:

(i) finalize the valuable study on "Concentration of market power" taking into account the comments made at the current session and written comments to be submitted by member States no later than the end of January 1993; and

(ii) prepare a study on "Competition and economic reforms in developing and other countries", for the twelfth session of the IGE, on the basis of the outline as revised by the Group. Appropriate coordination with the Ad hoc Working Group on Comparative Experiences with Privatization should be ensured.

economic order and market structures towards competition and private ownership as soon as possible so that the consequences of the former command economy could be eliminated without delay.

52. He indicated that the necessary adjustment process had jeopardized up to 90 per cent of all jobs in the new Federal Laender. As a result, pressures had been put on the Government to slow down the process by granting subsidies to secure at least parts of the old non-competitive industrial structures and by increasing payments to affected parties to cushion social problems. In spite of the conflict between competition and social policy, his country would press ahead with the privatization of state-owned firms and public services. Treuhandanstalt, the Government agency in charge of privatization, had meanwhile sold 9,000 former German Democratic Republic firms out of a total of about 12,000, which was no mean achievement. His country would also continue to promote competitive corporate structures, to prevent anticompetitive concentration of market power and to improve the conditions for market entry by removal of the regulations and other barriers to this. International confidence also helped in the process of economic renewal. As of the end of October 1992, some 500 German firms had been sold to foreign investors. The investment outlay of some DM 15 billion was thought to have safeguarded nearly 150,000 jobs. However, much remained to be done before the ultimate aim of establishing equal living conditions throughout the whole of Germany was accomplished.

53. With regard to enforcement measures taken by his country against RBPs, he referred to the written report submitted to the secretariat and published in document TD/B/RBP/89.

54. The representative of the Russian Federation stated that the Deputy Chairman of the Anti-Monopoly Committee of Russia had been expected to participate in the eleventh session of the Intergovernmental Group of Experts, but had been unable to attend at the last minute. He recalled that the IGE had been informed at its tenth session about the legislative basis that had been adopted, and the creation of the appropriate Anti-Monopoly Committee. Since then major changes had taken place which had important implications in the area of competition. The Government had adopted reforms in numerous areas, such as convertibility of the national currency, reform of the banking

system, revision of principles of taxation, and of investment rules - all of which were important in the transition to a market economy and had a strong impact on competition.

55. The process of demonopolization had to be considered in relation to overall economic and social problems. The structure of business and industry was such that it was not immediately competitive. Possibly 50 per cent could prove to be uncompetitive and go bankrupt if suddenly exposed to competition. This could create millions of unemployed. In spite of these enormous difficulties, the process of transition to a market economy was continuing. The Government was interested in drawing on the experience of other East European countries in the process of transition to a market economy, as well as that of developed market-economy countries, and hoped that UNCTAD would be instrumental in bringing about an exchange of experiences in that area. After commending the UNCTAD secretariat for the documentation submitted to the present session, he fully supported the proposal by the representative of Poland that a study should be undertaken by the secretariat on the role of competition in countries in transition to a market economy.

Chapter II

ORGANIZATIONAL MATTERS

A. Opening of the session

56. The eleventh session of the Intergovernmental Group of Experts on Restrictive Business Practices was opened on 23 November 1992 by Mr. E.T. Hand (United States), Vice-Chairman at the tenth session, as Mr. T.A. Ogada (Kenya) Chairman of the Intergovernmental Group of Experts at its tenth session, was unable to be present.

B. Election of officers

(Agenda item 1)

57. At the 1st plenary meeting of its eleventh session, on 23 November 1992, the Intergovernmental Group of Experts elected the following Bureau:

Chairman:	Mr. Gonzalo Santos	(Philippines)
Vice-Chairmen:	Mr. Calson Mbegabolawe	(Zimbabwe)
	Mr. P.L. Sanjeev Reddy	(India)
	Mr. Roberto Villambrosa	(Argentina)
	Mr. Henry Emden	(United Kingdom)
	Mr. Frantisek Peer	(Czechoslovakia)
Rapporteur:	Mr. Donald Partridge	(Canada)

C. Adoption of the agenda and organization of work

(Agenda item 2)

58. Also at its 1st plenary meeting, the Intergovernmental Group adopted its provisional agenda (TD/B/RBP/86), as follows:

1. Election of officers
2. Adoption of the agenda and organization of work
3. Review of the operation of and experience arising from the application and implementation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices
4. Activities relating to specific provisions of the Set:
   (a) Studies on restrictive business practices related to the provisions of the Set of Principles and Rules;

(b) Information and consultations on restrictive business practices;

(c) The model law or laws for the control of restrictive business practices, and the Handbook on Restrictive Business Practices Legislation;

(d) Technical assistance, advisory and training programmes on restrictive business practices.

5. Work programme on restrictive business practices

6. Provisional agenda for the twelfth session of the Intergovernmental Group of Experts

7. Other business

8. Adoption of the report of the Intergovernmental Group of Experts

D. Provisional agenda for the twelfth session of the Intergovernmental Group of Experts

(Agenda item 6)

59. At its ..... (closing) meeting, on .. November 1992, the Intergovernmental Group of Experts approved the draft provisional agenda for its twelfth session (TD/B/RBP/L.59).

E. Membership and attendance

[to be completed]

F. Adoption of the report of the Intergovernmental Group of Experts

(Agenda item 8)

60. At its ..... (closing) meeting, on 27 November 1992, the Intergovernmental Group of Experts adopted its draft report (TD/B/RBP/L.58 and Add.1-3) [with some amendments] and authorized the Rapporteur to complete the report to reflect the proceedings at the closing plenary.

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Held at the Palais des Nations, Geneva,
from 23 to 27 November 1992

Rapporteur: Mr. Donald Partridge (Canada)

CONTENTS

Chapter		Paragraphs
I.	Review of the operation of and experience arising from the application and implementation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (agenda item 3)	
	Activities relating to specific provisions of the Set (agenda item 4)	
	Work programme on restrictive business practices (agenda item 5)	61 - 70

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Chapter I (continued)

REVIEW OF THE OPERATION OF AND EXPERIENCE ARISING FROM THE APPLICATION AND IMPLEMENTATION OF THE SET OF MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES

(Agenda item 3)

ACTIVITIES RELATING TO SPECIFIC PROVISIONS OF THE SET:

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(d) TECHNICAL ASSISTANCE, ADVISORY AND TRAINING PROGRAMMES ON RESTRICTIVE BUSINESS PRACTICES

(Agenda item 4)

WORK PROGRAMME ON RESTRICTIVE BUSINESS PRACTICES

(Agenda item 5)

61. The representative of Portugal gave information on bilateral cooperation between Portugal and Angola on competition and price policy. This particular action of technical assistance undertaken by Portugal was of the utmost importance, not only because it was the first time that a programme tailored to the specific needs of Angola in the area of price and competition had been carried out, but also because it showed the will of Angola's authorities to implement a free market system and adopt the corresponding rules.

62. In July 1992, an official of the Portuguese authorities for competition and price policy was in Angola for one week to promote seminars, to study the local price and supply conditions and to analyse structural needs in the area of competition. Subsequently, in September and October 1992, four officials from the Price and Competition Department of the Ministry of Finance of Angola visited Portugal for an eight-week training programme in the Portuguese General Directorate for Competition and Prices in the fields of price and RBP control policy. The main aim of the programme was to assist the competent authorities of Angola in handling local price and supply matters more effectively and in preparing the national RBP legislation.

63. The representative of Ghana stated that, as outlined in TD/B/RBP/89/Add.1, his country had subscribed to the objectives and principles of the Set, but had neither the legislation to control or regulate RBPs nor the trained personnel to administer the RBP legislation. His country had now drawn up a draft law (known as the Trade Practices Law) which would shortly be submitted to the Cabinet for promulgation. He thanked the UNCTAD secretariat and donor countries for their valuable help in drafting the legislation. The next step would include a seminar for the business community; the establishment of an Authority to detect RBPs and administer the RBP legislation and, finally, a training programme for the staff of the Authority. His country would no doubt continue to request assistance.

64. The representative of Jamaica stated that her Government had drafted a competition bill which was currently being examined by a select committee of Parliament. A number of steps had been taken to facilitate the operation of a market economy - including the removal of price controls and the reduction of

tariff barriers - and it had become necessary to ensure fair play in the market place, through the "Fair Competition Act". In so doing, Jamaica took into account the provisions of the Set of Principles and Rules for the Control of Restrictive Business Practices.

65. Jamaica had requested information on restrictive business practices legislation in other countries and sought consultations with countries that had experience in the implementation of such laws. Assistance had been obtained from the United States through USAID and from the United Kingdom and Canada. Jamaica's rapid progress to the point it had now reached resulted in no little measure from the assistance received. She hoped that the necessary technical assistance would be provided in support of her country's efforts to ensure the smooth implementation of this very important legislation.

66. The representative of Chile reviewed his country's experience in the light of the far-reaching political and economic changes that had taken place there.

67. In 1985 privatization or deregulation of the main enterprises in the public sector had begun, partly by means of the so-called "popular capitalism" procedure, whereby 30 per cent of the capital was transferred to employees while the remaining capital was offered to entrepreneurs in the private sector. In other cases the enterprises were transferred in their entirety to private owners.

68. In 1973 competition courts were first established, consisting of a "preventive commission", a "decision-making commission" and the "National

Economic Investigatory Office". These had been continuously engaged in establishing general guidelines for achieving healthy and loyal competition in the market.

69. He said it was necessary to bear in mind that privatization in itself was not a guarantee of efficiency. A competitive environment had to be created to ensure the proper regulation of sectoral development so as to safeguard consumer interests.

70. He would be making available to delegations a specialized publication that showed the indices of growth and profitability for sectors that had been privatized and the level they had achieved. He would also provide the secretariat with 12 rulings of the two Commissions which reflected the criteria used for that purpose.

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PROVISIONAL AGENDA FOR THE TWELFTH SESSION OF THE INTERGOVERNMENTAL GROUP OF EXPERTS

Draft provisional agenda

1. Election of officers

2. Adoption of the agenda and organization of work

3. Review of the operation of and experience arising from the application and implementation of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices

4. Activities relating to specific provisions of the Set:

   (a) Studies on restrictive business practices related to the provisions of the Set of Principles and Rules;

   (b) Information and consultations on restrictive business practices;

   (c) The model law or laws for the control of restrictive business practices, and the Handbook on Restrictive Business Practices Legislation;

   (d) Technical assistance, advisory and training programmes on restrictive business practices.

5. Work programme on restrictive business practices

6. Provisional agenda for the thirteenth session of the Intergovernmental Group of Experts

7. Other business

8. Adoption of the report of the Intergovernmental Group of Experts.

GE.92-53019

B. Item 4 (b) - Information and consultations

The secretariat should:

(i) revise the checklists, contained in document TD/B/RBP/78/Rev.1, taking into account the comments made during the current session of the Group and comments received from member States before the end of January 1993;

(ii) prepare and circulate an updated directory on competition authorities; and

(iii) improve the dissemination of information on RBPs in goods and services through its annual and quarterly reports and keep other bodies of UNCTAD informed as appropriate.

C. Item 4 (c) - Model Law or laws and Handbook

The secretariat should:

(i) continue the elaboration of the Model Law or laws as follows:

(a) The draft possible elements for Articles, as contained in Part I A of TD/B/RBP/81/Rev.1 will be kept unchanged, on the understanding that the Model Law or laws contains the main elements of a typical RBP law based on the terminology agreed upon in the Set.

(b) Part I A should be considered in conjunction with a new Part II, containing a commentary specific to each element of Part I. The UNCTAD secretariat should revise the commentary. States members will be invited to make comments on the revised commentary at the next session of the IGE for the continued elaboration of the draft Model Law or laws.

(ii) With respect to the Handbook on RBPs Legislation, the secretariat should continue the compilation and updating of RBP legislation, and States wishing to contribute are requested to submit information concerning their competition legislation, according to the format contained in document TD/B/RBP/87, for publication in due time for the next IGE.

D. Item 4 (d) - Technical assistance

The secretariat should:

(i) continue to provide, upon request and within available resources, technical assistance, advisory and training services in the area of competition policy to developing countries and to countries in transition; and

(ii) undertake a review of technical cooperation activities in the field of competition policy by member States and international organizations, so as to enable the IGE at its twelfth session to make an evaluation of how to improve the effectiveness of UNCTAD's technical assistance activities.